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No. 6861

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-6861

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Respondents, in their brief, acknowledge the clear conflict among the circuits over whether a federal prisoner must exhaust administrative remedies before bringing a Bivens action seeking only damages. In light of that acknowledgement, their arguments against review, like their efforts to defend the Tenth Circuit's ruling on the merits, are unavailing.

1. While recognizing the basic conflict cited by petitioner,[1] respondents nevertheless oppose review for three

1 Notably, respondents do not even address the clear subsidiary conflict between the ruling below and the Fifth Circuit's Hessbrook decision over which administrative remedies must be

reasons. First, they observe that the courts of appeals do not disagree about an issue that is not presented in this case -- i.e., whether a federal prisoner who seeks both injunctive relief and damages must exhaust administrative remedies. Br. in Opp. 8-9. Whatever the validity of that observation, see Pet. 7 n.4, it simply has no bearing on whether the Court should grant the petition in this case.

Second, respondents suggest that conflicting decisions in the Third and Sixth Circuits are distinguishable because in those cases the prisoners were not complaining about "continuing prison practice[s]." See Br. in Opp. 10-11 & n.6 (citing Muhammad v. Carlson, 739 F.2d 122 (3d Cir. 1984) and Goar v. Civiletti, 688 F.2d 27 (6th Cir. 1982)); see also id. at 10 ("[I]t appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice."). In drawing this purported distinction, however, respondents have had to rewrite the decisions they try to reconcile with the ruling below. As the Tenth Circuit in this case recognized, Goar, Muhammad, and the many cases following them, see Pet. 8 n.6, focus solely on the type of relief sought by the prisoner. See Pet. App. 2a (Goar and Muhammed "hold that a federal prisoner seeking only

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exhausted by federal prisoners prior to bringing a Bivens action. See Pet. 10 n.7. However, they do apparently reject the Hessbrook rule -- previously supported by the Solicitor General -- that a federal prisoner bringing a Bivens action must exhaust the separate FTCA administative procedures. Compare Br. in Opp. 3 n.1 ("The administrative remedy in question is that set forth . . . in 28 C.F.R. 542.10-542.16."), with Br. for the United States in Opp., Prows v. Black (No. 88-6970), at 6-7.

money damages in a Bivens-type action need not first exhaust administrative remedies"). There is no basis for thinking that the Third and Sixth Circuits would require exhaustion in a pure damages case if the problem underlying the complaint appeared to be continuing or recurrent.

In any event, respondents' effort to treat this case as turning on a "continuing prison practice," Br. in Opp. 10-11, is unavailing -- first, because nothing in the decision below relies on such a characterization; and second, because the characterization is wrong. Relying on materials that are neither in the record nor properly the subject of judicial notice (since they are "subject to reasonable dispute," Fed. R. Evid. 201(b)), respondents assert that petitioner has filed a number of independent administrative grievances involving unspecified "medical treatment he was receiving." Br. in Opp. 4 n.2. Even if true, however, this assertion does not change the fact that in this case, petitioner complained only about one specific problem with medical care and sought only damages as relief.[2] Moreover, respondents neglect to note that, last month, petitioner was transferred out of the penitentiary at Leavenworth to another federal facility. That development extinguishes any possibility

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2 To the extent that respondents' "continuing conditions" argument attempts to extend petitioner's claim backward in time, it also rests on a misreading of petitioner's complaint. Compare Br. in Opp. 10 (contending that petitioner, in his complaint, alleges that he "suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff") with Pet. App. 12a-13a (the actual complaint, which focused on denial of adequate medical care over a period of several months following a recent back operation).

that the prison grievance procedure could now address any issue of "ongoing" care at Leavenworth raised implicitly by petitioner's lawsuit.

As a third and final argument against review, respondents suggest that "a uniform rule with respect to exhaustion is not required." Id. at 11. Explaining that "[c]ircuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion," respondents conclude that "[i]t is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures." Ibid.

This argument is meritless. To begin with, respondents fail to provide any references to case law, or even any statistics, supporting the idea that the circuits have divided on the basis of their relative resources or case loads. More importantly, it makes no sense to advocate a rule requiring exhaustion of the Bureau of Prisons' (BOP) grievance procedure in some jurisdictions but not in others. That procedure, after all, is set forth in a nationally applicable regulation and provides in all cases for a final appeal to the same official -- the Bureau's General Counsel. See Pet. App. 9a-10a (28 C.F.R. § 542.15). If a prisoner is seeking only damages, exhaustion will be equally beneficial, or futile, regardless of his prison's particular location. Finally, tolerance of continued intercircuit disarray on this issue will create enormous uncertainties for prisoners in circuits that have not yet spoken. In seeking to vindicate their constitutional rights, they will be

forced to guess about which rule will ultimately be applied to them.

2. On the merits of the exhaustion issue, respondents concede that the BOP's administrative grievance procedure does not allow for an award of damages, the only type of relief sought by petitioner. See Br. in Opp. 7 n.4. They nonetheless maintain that the decision below is correct because exhaustion of BOP remedies may achieve certain salutary effects, including "filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute." Id. at 7.

Without delving much further into the merits at this stage, we would simply note that respondents' arguments in this regard are deeply flawed. To begin with, as we noted in our petition, see Pet. 10, the BOP grievance procedure flatly excludes consideration of inmate "tort claims." Pet. App. 9a (28 C.F.R. § 542.12). Respondents seek to avoid this problem by pointing to an earlier general section in the regulations allowing an inmate to "seek formal review of a complaint which relates to any aspect of his imprisonment." Pet. App. 8a (28 C.F.R. § 542.10); see Br. in Opp. 7 n.4. But even respondents do not appear to contend that this general section authorizes consideration of a complaint that is a pure tort claim -- i.e., one that seeks only monetary compensation for past conduct.[3]

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3 See Br. in Opp. 7 n.4 ("Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated . . . .") (emphasis added).

Thus, respondents' argument that petitioner's grievance would have been entertained in the administrative process depends on their own unsupported characterization of the grievance as one seeking to forestall ongoing mistreatment.

Even if the BOP would entertain petitioner's tort claim, respondents are simply incorrect in predicting that exhaustion would "provide[] many benefits associated with prior administrative consideration." Br. in Opp. 7. First, as we noted in our petition, respondents vastly overstate the value of any paper "record" likely to be compiled through the BOP grievance procedure. Pet. 14-15. Nor is it an answer to point out, as respondents do, that an internal BOP policy statement requires prison officials to respond "in writing" to grievances. Br. in Opp. 7 n.3. Presumably that requirement would be satisfied by sending the grievant a letter stating simply, "Your grievance is denied."[4]

Second, even if the BOP grievance procedure were to produce "a record providing background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints," id. at 7-8, it would be an abdication of judicial duty for a court to rely on such a record in deciding, for example, to dismiss a prisoner's complaint as frivolous under 28 U.S.C. § 1915(d). Third, respondents are wrong in suggesting that the BOP's administrative remedies might "serve to conciliate or resolve" petitioner's claims. Br. in Opp. 8. Since petitioner's complaint sought only damages, and respondents concede that the grievance procedure does not allow for the award of monetary relief, id. at 7 n.4, there is no way that the grievance procedure could have "resolved" anything.[5]

As these factors make clear, it simply makes no sense to require a prisoner who seeks only damages to exhaust the BOP administrative process. Such a requirement entails not only delay in the vindiction of constitutional rights but the real possibility of forfeiture of a valid claim. See Pet. 13-14. And it serves no valid purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

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4 Respondents' related suggestion that the grievance procedure will provide useful "discovery" should be rejected out of hand. Br. in Opp. 7-8; see also Pet. App. 4a. Given the absence of formal mechanisms capable of creating a useful record, it is unlikely that the BOP's procedure will in fact yield any detailed new information. More fundamentally, respondents have cited no authority suggesting that it is appropriate to adopt an exhaustion requirement for the purpose of expanding the discovery provisions of the Federal Rules of Civil Procedure.

5 Respondents suggest that Congress would favor exhaustion here, citing the statutory provisions governing exhaustion in section 1983 actions by state prisoners. See Br. in Opp. 5-6. But as we explained in our petition, Congress has authorized states to avoid the nonexhaustion rule of Patsy v. Board of Regents, 457 U.S. 496 (1982), only where the state enacts an administrative grievance procedure that offers to state prisoners, among other things, "plain, speedy, and effective administrative remedies." 42 U.S.C. § 1997e(a)(1) (emphasis added). See Pet. 16-18. Because the BOP's administrative remedies would fail that test -- a point not disputed by respondents -- requiring federal prisoners to exhaust those remedies would run afoul of the available congressional intent on the issue presented by this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the bar of this Court, I hereby certify that one copy of the Reply Brief for Petitioner in McCarthy v. Maddigan, No. 90-6861, was served by first-class mail, postage prepaid, this 4th day of April, 1991, on the following:

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April 4, 1991

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RE: McCarthy v. Maddigan, et al., No. 90-6861

Dear Mr. Gullickson:

In accordance with our telephone conversation earlier today, I have enclosed for filing, pursuant to Supreme Court Rules 15.6 and 39, an original and 10 copies of the Reply Brief for Petitioner in support of the petition for a writ of certiorari in the above-captioned case. A certificate of service is also enclosed.

Sincerely,

Alan E. Untereiner

AEU:jc
Enclosures

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